U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-S- CORP.

DATE: FEB. 16, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of residential water treatment systems, seeks to permanently employ the Beneficiary as a service manager under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage. Accordingly, the Director denied the petition on June 10, 2015.

The matter is now before us on appeal. The Petitioner submits additional evidence and asserts that the Director erred in his calculation of the Petitioner's net current assets in 2013. The Petitioner also asserts that its net current assets in 2014 and the totality of the circumstances establish its ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

The instant petition's priority date is December 16, 2013, the date the U.S. Department of Labor (DOL) accepted the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the proffered wage of the offered position of service manager as $166,858 per year.[1]

[1] A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). The instant Form I-140, Immigrant Petition for Alien Worker, states the Beneficiary's proposed employment by the Petitioner in a different municipality than stated on the accompanying labor certification. However, online DOL information indicates that both municipalities are in the same Metropolitan Statistical Area (MSA). *See* U.S. Dep't of Labor, Foreign Labor Certification Data Ctr., at http://flcdatacenter/ OesWizardStep2.aspx?stateName=California (accessed Jan. 21, 2016). The labor certification

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from the priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay differences between the proffered wage and any wages paid. If a petitioner's amounts of net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The instant Petitioner states that it has contracted the Beneficiary's services from another company as a management consultant since at least 2013. The Petitioner claims it paid the Beneficiary $65,751.25 in 2013 and $65,483.75 in 2014.

The record supports the Petitioner's claimed payment to the Beneficiary in 2014. Copies of a "general ledger" report and an IRS Form 1099, Miscellaneous Income, indicate the Petitioner's total payments to the Beneficiary in 2014 of $65,483.75.

However, a copy of a "general ledger" report for 2013 indicates the Petitioner's payments totaling $65,751.25 not to the Beneficiary, but to the company that purportedly contracted his services to the Petitioner. The record also does not contain a copy of an IRS Form 1099 issued by the Petitioner to the Beneficiary in 2013.

The record does not establish the Petitioner's claimed payments to the Beneficiary in 2013. If the Petitioner paid the Beneficiary $65,751.25 in 2013 as it claims, the record does not explain why the 2013 general ledger report does not name the Beneficiary as the payments' recipient and why the Petitioner did not issue him an IRS Form 1099 for that year as it did for 2014. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Also, the amount paid to the Beneficiary by the Petitioner in 2014 does not equal or exceed the annual proffered wage of $166,858. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its payments to the Beneficiary.

However, we credit the Petitioner's payments to the Beneficiary in 2014. The Petitioner need only demonstrate its ability to pay the difference between the proffered wage and the total amount it paid the Beneficiary in 2014, or $101,374.25.

---

therefore remains valid despite the change in the geographic area of intended employment. *See* 20 C.F.R. § 656.3 (defining the term "area of intended employment" to include any place within the same MSA).

[2] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *see also River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

The Petitioner's federal income tax returns reflect annual net income amounts of $37,917 in 2013-14 and $65,391 in 2014-15.[3] These annual amounts of net income do not equal or exceed the proffered wage in 2013, or the difference between the proffered wage and the amount paid by the Petitioner to the Beneficiary in 2014. The record therefore does not demonstrate the Petitioner's ability to pay based on its net income.

The Petitioner's tax returns reflect annual amounts of net current assets of $113,150 in 2013-14 and $190,310 in 2014-15. The Petitioner's net current asset amount in 2014-15 exceeds the difference between the annual proffered wage and the amount paid to the Beneficiary by the Petitioner in 2014. However, the Petitioner's net current assets amount in 2013-14 does not equal or exceed the annual proffered wage of $166,858 for 2013. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its net current assets.

Thus, based on examinations of the Petitioner's payments to the Beneficiary and its amounts of net income and net current assets, the record does not demonstrate the Petitioner's ability to pay the proffered wage.

The Petitioner argues that it need only pay the proffered wage from the petition's priority date of December 16, 2013. Therefore, the Petitioner asserts that it need only demonstrate an ability to pay $105,890 during the 33-week portion of its 2013-14 fiscal year that occurred after the petition's priority date. It argues that its net current asset amount of $113,150 in 2013-14 exceeds that prorated proffered wage amount.

However, the record does not establish the Petitioner's generation of sufficient net current assets during its 2013-14 fiscal year after the petition's priority date of December 16, 2013. We do not consider 12 months of net current assets to establish an ability to pay about only eight months of a proffered wage. We therefore decline to prorate the proffered wage for 2013-14 and reject the Petitioner's argument.

As previously indicated, we may consider other evidence of a petitioner's ability to pay a proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual income amounts of about $100,000 and employing four people on a full-time basis. However, during the year of the petition's filing, she relocated her business, causing her to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend business operations. Despite the setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established her ability to pay the proffered wage. The petitioner established herself as a fashion designer whose work had been featured in national magazines. The record identified her clients as the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicated the petitioner's frequent lectures at design and fashion shows throughout the United States and at California colleges and universities.

[3] The tax returns indicate that the Petitioner's fiscal years run from August 1 to July 31.

As in *Sonegawa*, we may consider evidence of the instant Petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the Beneficiary will replace a current employee or outsourced service; and any other evidence of the Petitioner's ability to pay the proffered wage.

The instant record indicates the Petitioner's continuous business operations since 2008 and its employment of 20 workers at the time of the petition's priority date and filing. The Petitioner's tax returns reflect increasing amounts of revenues, and salaries and wages paid, from 2013-14 to 2014-15.

However, unlike in *Sonegawa*, the instant record does not indicate the Petitioner's incurrence of any uncharacteristic business expenditures or losses during the relevant period. Counsel asserts the Petitioner's "outstanding reputation in serving its communities with a vital necessity, . . . clean water." However, the record does not contain evidence supporting counsel's assertion. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's unsupported assertions do not establish facts of record). The record therefore does not establish the Petitioner's outstanding reputation in its industry.

As previously discussed, the record indicates the Beneficiary's current rendering of contracted management consulting services to the Petitioner. However, the record does not establish that the Petitioner's proposed employment of the Beneficiary in the offered position would eliminate its need for the consulting services. The record does not indicate whether the Beneficiary's duties as a management consultant include the duties of the offered position. On the accompanying labor certification, the Beneficiary described his primary duties with the contracted company as "[f]ormulat[ing], direct[ing] and coordinat[ing] marketing activities and policies to promote products and services." The record does not establish that the Petitioner's employment of the Beneficiary in the offered position would replace the management consulting services he currently provides. Thus, assessing the total circumstances in the instant case, the record does not establish the Petitioner's ability to pay the proffered wage pursuant to *Sonegawa*.

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

II. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Beyond the Director's decision, the record also does not establish the Beneficiary's claimed qualifying experience for the offered position and the requested classification.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§

103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *see also Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Also, a petition for an advanced degree professional must be accompanied by evidence that a beneficiary has a U.S. advanced degree or a foreign equivalent degree, or a U.S. baccalaureate degree or a foreign equivalent degree followed by at least 60 months of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(3); *see also* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate").

In the instant case, the accompanying labor certification states the minimum requirements of the offered position of service manager as a U.S. Bachelor's degree or a foreign equivalent degree in business administration, plus 60 months of experience in the job offered. In the alternative, the labor certification states the Petitioner's acceptance of a Master's degree plus three years of experience in the job offered. In Part H.10 of ETA Form 9089, the Petitioner indicated that experience in an alternate occupation is unacceptable.

The record establishes the Beneficiary's receipt of a foreign degree equivalent to a U.S. Bachelor's degree in business administration in 1995. The Beneficiary also attested on the accompanying labor certification to his acquisition of more than 20 years of related experience before the petition's priority date. The Beneficiary stated the following experience:

- About 125 months as a marketing and business development manager with [redacted] in the United States from July 25, 2003 until the petition's priority date of December 16, 2013;
- About 50 months as a general director with [redacted] in Mexico from March 1, 1999 to May 31, 2003;
- About 35 months as an ISO-9001 and human resource manager with [redacted] from April 1, 1996 to February 28, 1999;
- About 31 months as a plant administrative manager with [redacted] from September 1, 1993 to March 31, 1996;
- About 13 months as an accounting assistant manager with [redacted] from August 1, 1992 to August 31, 1993; and
- About 20 months as a part-time finance director with [redacted] in Mexico from November 1, 1990 to July 31, 1992.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and

descriptions of a beneficiary's experience. *Id.* If required evidence is unavailable, a petitioner must demonstrate the unavailability of the evidence before we may consider other evidence, such as affidavits from non-parties with "direct personal knowledge" of the events and circumstances in question. 8 C.F.R. § 103.2(b)(2)(i).

In the instant case, the Petitioner relied solely on the Beneficiary's claimed 129 months of qualifying experience with The Petitioner submitted a November 23, 2013, letter on the personal stationery of a purported former operations director of The letter states full-time employment of the Beneficiary from August 1992 to May 2003 and details his duties in various positions during that period.

However, the record lacks evidence of the employment of the letter's signatory by during the relevant period. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding that unsupported assertions do not meet the burden of proof in visa petition proceedings). The letter's signatory stated his employment by for about 58 months from August 1998 to May 2003. Thus, the letter appears to lack the signatory's "direct personal knowledge" of the Beneficiary's claimed qualifying experience with before August 1998. The letter therefore does not establish the Beneficiary's possession of at least 60 months of experience as specified on the accompanying labor certification and as required for the requested classification.

In response to the Director's request for evidence of March 20, 2015, the Petitioner submitted additional evidence of the Beneficiary's claimed qualifying experience with An April 6, 2015, letter from the same purported former operations director and an April 16, 2015, letter from a purported former corporate director of state the company's dissolution on an unspecified date. The letter from the purported corporate director confirms the information in the 2013 letter of the purported operations director. The Petitioner also submitted copies of the Beneficiary's payroll records with from January and February 2003, and his business cards in the company's name.[4]

corporate dissolution would explain the unavailability of an employment letter on its stationery. However, the record lacks independent, objective evidence of the purported dissolution and the claimed former affiliations of the letters' signatories with the company. *See Soffici*, 22 I&N Dec. at 165 (finding that unsupported assertions do not meet the burden of proof in visa petition proceedings). Also, the name of the purported former corporate director suggests a family relationship between the director and the Beneficiary. The letter from the former corporate director therefore does not appear to represent independent, objective evidence of the Beneficiary's claimed qualifying experience.

[4] The record also contains a copy of a May 2000 news article that appears to identify the Beneficiary as general director. However, the article is written in the Spanish language and is not accompanied by an English translation. *See* 8 C.F.R. § 103.2(b)(3) (requiring any document submitted to USCIS containing foreign language to be accompanied by a full, certified, English translation).

In addition, the record does not establish the Beneficiary's claimed experience with [redacted] as experience gained in the job offered as specified on the accompanying labor certification. The labor certification states that the offered position involves managing maintenance and repair services on residential water treatment systems. The labor certification states that experience in an alternate occupation is unacceptable. The letters from the former purported [redacted] directors state the Beneficiary's experience in supervising the operations of a manufacturing plant. The record does not explain how the Beneficiary's claimed experience supervising a manufacturing plant constitutes experience in the offered job, which involves managing maintenance and repair services on residential water treatment systems.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the qualifying experience for the offered position and the requested classification. We will therefore dismiss the appeal for these additional reasons.

III. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal. Also, the record does not establish the Beneficiary's possession of the qualifying experience for the offered position and the requested classification. We will also dismiss the appeal for these reasons.

The petition will be denied for the reasons stated above, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petition bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-A-S- Corp.*, ID# 15951 (AAO Feb. 16, 2016)